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No. 83-1829

In the Supreme Court of the United States

October Term, 1983

IDA MARY LEWIS,

Petitioner,

v.

UNIVERSITY OF PITTSBURGH and
UNIVERSITY OF PITTSBURGH BOOK CENTER,

Respondent.

Brief In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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34 pp

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the internal operating procedures followed by the United States Court of Appeals for the Third Circuit in denying Petitioner's Request for Rehearing En Banc are valid under 28 U.S.C. § 46(c)?

2. Whether the trial court, in a case claiming race discrimination in promotion, abused its discretion by excluding evidence that the person selected for a promotion was related to a management employee when there was no evidence of a pattern of practice of relatives of managers being promoted?

3. Whether the trial court's findings of fact were clearly erroneous where the findings were supported by substantial evidence on the record and the court chose to credit the testimony of the Respondent's witnesses over the contradictory testimony of the Petitioner?

4. Whether, having failed to request a special jury instruction on inferential proof of intent, having failed to object to the instructions given by the trial judge in this regard, and having further failed to raise the issue on appeal of the trial judge's jury instruction with regard to inferential methods of proof of discriminatory intent, the Petitioner may now challenge the instructions given by the trial court with regard to inferential or indirect proof of intent?

5. If the answer to Question 4 above is in the affirmative, whether the trial court properly instructed the jury that discriminatory intent can be shown inferentially?

6. Whether the trial court's instruction to the jury that it could find for the Petitioner only if it decided that but for her race, she whould have been promoted and the trial court's use of the same standard in the disposition of the Title VII claim constituted a proper application of the law?

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
I. OPINIONS OF THE COURTS BELOW	1
II. JURISDICTION	1
III. STATEMENT OF THE CASE	1
A. Procedural History	1
B. Statement of Facts	3
IV. REASONS FOR DENYING THE WRIT	8
A. The Court of Appeals' Internal Operating Procedures Are Valid Under 42 U.S.C. § 46(c) and Should Not Now Be Modified By This Court	8
B. The Trial Court Made Proper Evidentiary Rulings in Excluding Evidence of Nepotism Proffered by the Petitioner	11
C. The Trial Court's Findings of Fact Are Supported by the Evidence on the Record and Are Not Clearly Erroneous	14
D. The Trial Court's Jury Instructions Regarding Indirect Proof were Proper; Moreover, in the Absence of Petitioner's Objection or Request for a Special Charge, They Do Not Constitute Plain Error so as to Warrant Review by This Court	18
E. The Trial Court Applied the Proper Legal Standard of Causation to All of Petitioner's Claims	23
V. CONCLUSION	28

TABLE OF AUTHORITIES

CASES

Page

Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975) 24

Anderson v. United States, 417 U.S. 211, 94 S. Ct. 2253, 41 L.Ed.2d 20 (1974) 22

Arnold v. Eastern Airlines, 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, ____ U.S. ____, 104 S. Ct. 703, 79 L.Ed.2d 168 (1984) 10

Bentley v. Stromberg-Carlson Corp., 638 F.2d 9 (2nd Cir. 1981) 25

Croker v. Boeing, 662 F.2d 975 (3rd Cir. 1981) 23

Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981) 13

Eubanks v. Pickens-Bond Construction Co., 635 F.2d 1341 (8th Cir. 1980) 12

Gibson v. ILWU Local 40, 543 F.2d 1259 (9th Cir. 1976) 12

In Re American Boradcasting Companies, ____ U.S. ____, 104 S. Ct. 538, 78 L.Ed.2d 718 (1983) ... 10

Jackson v. City of Killeen, 654 F.2d 1181 (5th Cir. 1981) 23, 25, 26

Lewis v. University of Pittsburgh, 725 F. 2d 910 (3rd Cir. 1983) 14, 26

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 24, 25

Page

Lombard v. School District of Erie, 463 F. Supp. 566 (W.D. Pa. 1978) 12

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S. Ct. 2574, 49 L.Ed. 2d 493 (1976) 24, 25

McWilliams v. Escambia County School Board, 658 F.2d 326 (5th Cir. 1981) 23

Paluch v. Erie L. R.R., 387 F.2d 996 (3rd Cir. 1968) 22

Shenker v. Baltimore & O.R.R., 374 U.S. 1, 83 S. Ct. 1667, 10 L.Ed.2d 709 (1963) 8, 9, 10, 11

Smith v. Coy, 460 F.2d 1226 (3rd Cir. 1972) 22

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981) 12, 18, 20, 22, 23

United States v. Forness, 125 F.2d 928 (2nd Cir. 1942), *cert. denied,* 316 U.S. 694, 62 S. Ct. 1293, 86 L.Ed. 1764 (1942) 15

United States v. Martorano, 620 F.2d 912 (lst Cir. 1980), *cert. denied,* 449 U.S. 952, 101 S. Ct. 356, 66 L.Ed.2d 216 (1980) 10

United States v. National Ass'n. of Real Estate Boards, 339 U.S. 485, 70 S. Ct. 711, 94 L.Ed. 1007 (1950) 15

United States v. Yellow Cab Co., 388 U.S. 338, 70 S.Ct. 177, 94 L.Ed. 150 (1949) 15, 17

Page

United States Postal Serice Board of Governors v. Aikens, ____ U.S. ____, 103 S. Ct. 1478, 75 L.Ed.2d 403 (1983) 13, 14, 20

United States Steel Corp. v. Fraternal Ass'n. of Steel Haulers, 601 F.2d 1269 (3rd Cir. 1979) 15

Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247, 73 S. Ct. 656, 97 L.Ed. 986 (1953) 10

Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980) 25, 26

OTHER AUTHORITIES

Page

28 U.S.C. § 46(c) 9, 10, 11

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1981 ..... Passim

42 U.S.C. §1983 ..... Passim

42 U.S.C. §2000e *et seq.*, Title VII of the Civil Rights Act of 1964 ..... Passim

Federal Rule of Civil Procedure 52(a) 15

Internal Operating Procedures of the United States Court of Appeals for the Third Circuit 11

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Pursuant to the authority of Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, the University of Pittsburgh and the University of Pittsburgh Book Center respond to the petition of Ida Mary Lewis and request that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

I. OPINIONS OF THE COURTS BELOW

Respondent would supplement the Petitioner's statement of the Opinions of the Courts Below by noting that the Petitioner also seeks review of the Order of the United States Court of Appeals for the Third Circuit dated February 9, 1984, denying her request for rehearing. This Order is set forth at page 56a of the Appendix to Petition.

II. JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1).

III. STATEMENT OF THE CASE

A. Procedural History

This case arises because Petitioner, Ida Mary Lewis, brought an action against the University of Pittsburgh after she was denied a promotion to the position of Assistant Buyer in the University of Pittsburgh Book Center in October, 1976. Petitioner claimed that she had been denied the promotion because of her race, black, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. §§ 1981 and 1983.

On December 13, 1982, a trial commenced on all three of Petitioner's claims. The claims brought pursuant to Sections 1981 and 1983 were tried before a jury, and the Title VII claim was tried before the district court. On December 16, 1982, the jury returned a verdict in favor of the University of Pittsburgh on the Section 1981 and Section 1983 claims (Record on Appeal at 8a). The trial court filed an Opinion and Order of Court on January 6, 1983 which contained the court's findings of fact and conclusions of law and entered judgment in favor of the University of Pittsburgh on the Title VII claim. The court also

denied Petitioner's Motion for Verdict, for Judgment Notwithstanding Special Interrogatories and/or Verdict or for a New Trial (Record on Appeal at 41a-49a).

Petitioner subsequently filed an appeal to the United States Court of Appeals for the Third Circuit. On December 30, 1983, a three judge panel of the Court of Appeals decided in favor of Respondent and against Petitioner. Petitioner's Petition for Rehearing was denied on February 9, 1984.

This Petition followed.

B. Statement of Facts

In October, 1976, Ida Mary Lewis, a black female, applied for the vacant position of Assistant Buyer in the Trade Book Department of the University of Pittsburgh Book Center (hereinafter referred to as the "Book Center" or "Respondent") (Record on Appeal at 90a-91a). Russell Kierzkowski (hereinafter referred to as "Kierzkowski"), the Cloth Book Buyer in the Trade Book Department, and Dwight Fong (hereinafter referred to as "Fong"), the Paper Book Buyer in the Trade Book Department, met with each of the applicants for the vacant position and selected Jean Aiello (hereinafter referred to as "Aiello"), a white female, to fill the position of Assistant Buyer in the Trade Book Department (Record on Appeal at 180a-181a; 283a-284a).

Lewis was first employed by the Book Center in December, 1965, as a Clerk in the Textbook Department until she subsequently became a Clerk in the Trade Book Department (Record on Appeal at 78a-79a; 99a; 114a). In July, 1967, Lewis was offered and accepted the position of Technical Book Buyer within the Trade Book Department and was placed in charge of the Technical Book Section, a separate area within the Trade Book Department (Record

on Appeal at 85a-86a). Lewis held this position until February, 1975, when the Technical Book Section was abolished as a separate section (Record on Appeal at 86a).[1] Since that time, Lewis has been employed as a Sales Clerk in the Trade Book Department (Record on Appeal at 89a).

Kierzkowski became the Cloth Book Buyer in May, 1972, at which time he and Fong, the Paper Book Buyer, assumed overall responsibility for the operation of the Trade Book Department, including the Technical Book Section which was at that time being run by Lewis (Record on Appeal at 208a-209a; 279a-280a).

One of Lewis' principal responsibilities was to do the book returns in the Techncial Book Section (Record on Appeal at 591a). This involves returning books that have not sold within a specified period to the publisher of the book for credit. If books are not returned within the time allotted, generally one year, and special permission cannot be obtained from the publisher to make the return, the books must be discounted and sold at a loss. In addition, if returns are not made promptly, it adversely affects sales since shelves are occupied with books that are not selling instead of faster-moving items (Record on Appeal at 135a-139a; 290a-295a; 340a).

Upon assuming his responsibilities, Kierzkowski became aware that returns of books in the Technical Section had not been properly handled. He instructed Lewis to take care of these returns (Record on Appeal at 286a-287a). Over the course of the next several months, Kierzkowski would periodically check with Lewis who told him that they were working very hard and that everything that could be done was being done (Record on Appeal at 287a-288a).

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[1]Lewis was informed that the section was going to be abolished many months before it actually occurred (Record on Appeal at 87a).

In December, 1972, Kierzkowski, checking on the returns of technical books, found that many returns still had not been made and that books two and three years old were still on the shelves (Record on Appeal at 287a; 380a). In January, 1973, Kierzkowski instructed Aiello, a Clerk in the Trade Book Department, to assist Lewis in making the necessary returns (Record on Appeal at 288a; 374a). When Aiello tried to help Lewis, Lewis would give her one or two books at a time to return. Aiello found this to be an unusual departure from the proper method of doing returns. Consequently, Aiello told Kierzkowski that she thought something was wrong (Record on Appeal at 374a-377a). Finally, Kierzkowski told Lewis that he would personally supervise the performance of returns and utilize Aiello to help him (Record on Appeal at 287a-289a; 374a-376a).

Kierzkowski instructed Aiello to begin doing the returns by pulling all books that were nine months or older from the shelves in the Technical Section for return (Record on Appeal at 289a; 291a; 377a). Once Aiello began taking the books from the shelves, she found well over half the books in the Technical Section were more than six to nine months old (Record on Appeal at 280a). The backlog of returns turned out to be so large that it took six to seven months to complete the returns and Kierzkowski had to assign another clerk to help Aiello with the returns (Record on Appeal at 188a; 296a; 380a; 423a; 443a). The reason that the returns took so long to complete, aside from sheer volume, was that for most of the books there were no stock control cards in Lewis' files (Record on Appeal at 389a). Consequently, the necessary information to complete the returns was not available and had to be reconstructed by searching through purchase orders (Record on Appeal at 381a-383a). In the end, most of the books that were pulled from the shelves could not be returned for credit and had to be sold at a loss (Record on Appeal at 295a; 384a).

While the returns were being cleared up, Kierzkowski and Aiello discovered that the stock checks and reordering of technical books also had not been properly performed (Record on Appeal at 298a; 391a-397a; 381a-382a). Periodic stock checks are crucial because only by taking regular inventory of a section can the Book Center determine which books are selling and which must be reordered (Record on Appeal at 139a-140a; 308a; 388a-391a). Kierzkowski instructed Lewis to do the stock checks, but eventually had to assign Aiello to do this task after it became apparent that Lewis would not or could not perform it (Record on Appeal at 302a-307a).

Similarly, Fong, at approximately the same time, found that the paperback technical books had not been properly returned or reordered. Many of the paperback books were old, dusty, discolored, and worn. Fong took care of the reordering and returning of the paperback technical books at this time by himself (Record on Appeal at 210a-212a).[2]

After the return situation was rectified, Kierzkowski instructed Lewis to handle the returns on a regular basis from that point on (Record on Appeal at 299a-300a). Lewis, however, again failed to properly complete the returns in the Technical Section and Kierzkowski again assigned Aiello to do the returns in that section (Record on Appeal at 300a-301a; 384a-385a). After Aiello completed the returns for the second time, Kierzkowski also assigned her to do the stock checks again (Record on Appeal at 307a-308a; 391a; 432a). Aiello continued to do the returns, reorders, and stock checks for the Technical Section until it was abolished in February, 1975 (Record on Appeal at 364a; 385a; 389a).

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[2]Paperback technical books comprised only a small portion of the total number of technical books (Record on Appeal at 213a).

Between July 1, 1972 and June 30, 1973, the period during which the problems with returns and stock checks of technical books arose, sales of technical books declined by $25,000, or 36 percent from sales of the previous year (Record on Appeal at 297a; 314a; 347a).

The Assistant Buyer position that became available in 1976 consisted primarily of being responsible for handling the returns of all paperback and clothbound books in the entire Trade Book Department, a responsibility significantly greater in scope than the responsibilties Petitioner failed to previously perform (Record on Appeal at 221a-223a; 283a; 392a).[3] In addition, the Assistant Buyer would be a substitute supervisor and perform other general duties (Record on Appeal at 283a; 392a).

Kierzkowski and Fong did not select Lewis for this position because of the problems that had been encountered with Lewis' handling of returns, stock checks and reorders, the most fundamental requirements of the Assistant Buyer position (Record on Appeal at 187a-189a; 314a).

Respondents will not contest seriatim the facts categorized by Petitioner as undisputed at trial. However, an example of the misleading nature of this characterization is found in Paragraph 10 on page 8 of the Petition. Petition contends that Fong and Kierzkowski failed to follow the University's Staff Handbook by not giving her written warnings for lack of job performance proficiency. As the record clearly establishes, the provisions of the Staff Handbook took effect well after the time when Fong or

[3]By 1976, the dollar volume of paperback and clothbound trade books totaled approximately $1 million (Record on Appeal at 221a-222a; 310a), while the highest volume of sales in the Technical Section when Lewis was responsible for handling returns prior to 1973 was $78,291 (Record on Appeal at 346a).

Kierzkowski would have had occasion to admonish Petitioner for substandard job performance (Record on Appeal at 545a).

Paragraph 8 on page 8 of the petition is similarly quite misleading. Petitioner contends that during the years in which she held the position of Buyer of technical books, the gross dollar volume of sales of technical books increased each year with the possible exception of one year. Petitioner fails to note that during the latter part of this period, she was performing in more of a clerical capacity than a buyer capacity, as Aiello had taken on the bulk of the stock check, return and reorder duties in January of 1973 (Record on Appeal at 362a-366a). Moreover, the figure of $91,625 in gross dollar sales for which Petitioner alludes she had responsibility in fiscal 1975 is misleading because her department was abolished in February of 1975. Thereafter, Fong and Kierzkowski performed Petitioner's buyer duties, and any increase in gross sales was attributable to them and not to Petitioner (Record on Appeal at 364a).

IV. REASONS FOR DENYING THE WRIT

A. The Court of Appeals' Internal Operating Procedures Are Valid Under 42 U.S.C. §46(c) and Should Not Now be Modified by This Court.

Petitioner argues that the United States Court of Appeals for the Third Circuit, in applying its internal operating procedures, has deprived her of her right to full appellate review and thereby effected a manifest injustice. Respondent submits that Petitioner's argument is completely without merit and that it brings to the Court an issue to which the Court has consistently denied review since its decision in *Shenker v. Baltimore & O. R.R.*, 374

U.S. 1, 83 S. Ct. 1667, 10 L.Ed.2d 709 (1963). The internal operating procedures in question here are set forth at length in the Petition at pages 67a through 72a and do not bear repeating here. Effectively, they require the vote of six of ten active Circuit judges in order to grant a rehearing en banc. Petitioner argues that since five Circuit judges did vote for rehearing en banc, and two Circuit judges recused themselves *sua sponte,* she was unfairly denied the opportunity of en banc review.

The authority of the Circuit Courts of Appeals to make rules providing for rehearing en banc is derived from Section 46(c) of the Judicial Code of 1948, 28 U.S.C. § 46(c). In *Shenker,* the Court addressed the identical issue presented here. There, rehearing en banc was denied, even though four of the eight active judges on the Third Circuit at that time voted to grant rehearing. This Court upheld the Third Circuit's rule requiring an absolute majority of the active members stating that:

> In our view, Section 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the Court the power to order hearings en banc. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or a rehearing en banc. *The Court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing* . . . . the rights of the litigant go no further than the right to know the administrative machinery that will be followed and the right to suggest that the en banc procedure be set in motion in his case . . . . *For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals.*

374 U.S. at 4-5, 10 L.Ed.2d at 713, *citing Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 250, 73 S. Ct. 656, 97 L.Ed.2d 986, 990-991 (1953) (emphasis added). Hence, this Court has clearly indicated that the draftsmen of Section 46(c) intended to grant the en banc power to the Courts of Appeals and no more. The Courts themselves were to establish the procedure for the exercise of that power.

The Supreme Court has rebuffed repeated attempts to reexamine this interpretation of Section 46(c). *See In Re American Broadcasting Companies*, ____ U.S. ____, 104 S. Ct. 538, 78 L.Ed.2d 718 (1983) (denying writ of mandamus to compel rehearing en banc after the United States Court of Appeals for the Sixth Circuit refused a rehearing, despite a five-four vote by participating judges in favor of granting rehearing en banc with one recusal). Moreover, the Supreme Court has refused generally to review internal operating procedures of the Circuit Courts of Appeals with respect to en banc operating procedures. *See Arnold v. Eastern Airlines*, 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, ____ U.S. ____, 104 S. Ct. 703, 79 L.Ed.2d 168 (1984); *United States v. Martorano*, 620 F.2d 912 (1st Cir. 1980), *cert. denied*, 449 U.S. 952, 101 S. Ct. 356, 66 L.Ed.2d 216 (1980).

The legislative background of Section 46(c), as expounded upon by this Court, leaves great latitude to the Courts of Appeals in formulating procedures for the grant of en banc hearings. The Third Circuit requires that a majority of its active judges vote for en banc hearing before such hearing is granted. This is to ensure that the law of the Circuit reflects the participation of all members of the Court. *See* Statement Sur Petition for Rehearing of Judge Adams, at p. 57a of the Petition. If the rule were

otherwise, the Third Circuit could grant a petition for rehearing, for example, by a vote of three to two with five judges recusing themselves or abstaining. Then the en banc panel might consist of only five judges and the settled law of the Circuit could be overturned by as few as three members of the Court. This result surely would not foster intracircuit uniformity, which is the very purpose of having en banc hearings.[4] Such an anamoly certainly was not contemplated by the drafters of Section 46(c).

The internal operating procedures in question here met the requirements already outlined by this Court in that they adequately advised the Petitioner of the administrative mechanism to be followed in granting en banc rehearing and gave the Petitioner the right to suggest that the en banc procedure be set in motion. *Shenker*, 374 U.S. at 5, 10 L.Ed.2d at 713. This Court has repeatedly refused to intervene to require more than what was provided to the Petitioner in the present case, and it should again refrain from reviewing the en banc hearing rules of the United States Court of Appeals for the Third Circuit.

B. The Trial Court Made Proper Evidentiary Rulings in Excluding Evidence of Nepotism Proffered by the Petitioner.

During the course of the trial, Petitioner attempted to introduce into evidence the fact that Jean Aiello is the niece of the Operations Manager of the Book Center. The trial court properly excluded this proffered item of evi-

[4]This uniformity is especially emphasized by the Third Circuit's strict rule of *stare decisis* in Internal Operating Procedure 8C, which is codified as follows:

> It is the tradition of this court that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published decision of a previous panel. Court in banc consideration is required to overrule a published opinion of this court.

dence since it bore no relevance to the issues involved in the case. Introduction of this evidence would have presented the fact-finder with yet another reason to find that the decision not to promote Petitioner was not racially motivated. For this reason alone, Petitioner was not adversely affected by the exclusion of evidence of nepotism. This issue does not merit review by the Court.

An isolated incident of nepotism does not constitute racial discrimination. In fact, in that situation, action taken because of one's familial relation actually negates a finding of racial discrimination. *Eubanks v. Pickens-Bond Construction Co.*, 635 F.2d 1341, 1347 (8th Cir. 1980); *Gibson v. ILWU Local 40*, 543 F.2d 1259 (9th Cir. 1976); *Lombard v. School District of Erie, Pa.*, 463 F. Supp. 566 (W.D. Pa. 1978).

Petitioner contended on appeal that such evidence would be relevant to show the state of mind of the decision makers, and it would be relevant to show that the decision to favor a relative of a current employee is a violation of the University's ban against nepotism (Petitioner's Brief on Appeal at 29). Neither of these two items would have furthered the inquiry in this case.

While the state of mind of the two decision makers in this case is relevant, it is relevant only to the extent that it can be shown that they were motivated by racial considerations. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259, 101 S. Ct. 1089, 67 L.Ed.2d 207, 219 (1981). It is not relevant to the extent that the decision makers were motivated by an alleged desire to please the Operations Manager by promoting her niece.

Similarly, the fact that nepotism is prohibited by the University's Staff Handbook has no bearing on this case. Whether or not the decision makers violated an employ-

ment policy against nepotism is not at issue in this case. If they selected Jean Aiello because of her relation to the Operations Manager, then their decision was not motivated by racial considerations whether or not it violated the Staff Handbook.

Introduction of such evidence would not tend to show that the decision makers were motivated by racial considerations. In *Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981), the plaintiff, in an attempt to show that the employer's articulated reason for his dismissal (poor performance as manager of a book store) was a pretext for discrimination, argued that he was really terminated because of his criticism of financial transactions conducted by his superior. The court in rejecting this argument stated that "this theory does nothing to support Douglas' claim that he was discharged on the basis of age, but merely presents an alternate reason not based on age." *Id.* at 534. In this case, interjection of Petitioner's nepotism theory would similarly not support her claim of race discrimination, but would merely present an alternate reason not based on race. Consequently, the trial court properly excluded such evidence.

Petitioner now relies upon the concurring opinion in *United States Postal Service Board of Governors v. Aikens*, ____ U.S. ____, 103 S. Ct. 1478, 75 L.Ed.2d 403 (1983) (Blackmun, J., concurring) that the plaintiff may establish pretext by showing that the employer's proffered explanation is unworthy of credence, 75 L.Ed.2d at 413, in arguing that the trial court's exclusion of the evidence of nepotism was error.

Petitioner's argument is clearly flawed. Evidence of nepotism as a factor impelling the decision not to promote Petitioner would not have served to demonstrate that

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Respondent had a discriminatory intent making that decision. As cogently noted by the Court of Appeals majority and the trial court, "whether or not nepotism entered into the decision to promote was not relevant to a finding of *racial* discrimination. Indeed, a showing that any factor other than race was a determinative factor in the decision would actually buttresss the [Respondent's] defense." *Lewis v. University of Pittsburgh,* 725 F.2d 910, 919, fn.10 (3rd Cir. 1983) (Appendix to Petition at 31a). Hence, where the plaintiff would attempt to show that the employer's proffered reason is unworthy of credence by introducing evidence of another reason which directly negates any inference of discriminatory intent, the logic of the *Aikens* concurrence fails. In such a situation, it cannot be a reversible error to prohibit the introduction of such evidence.

For the above reasons, the exclusion of the evidence of nepotism was proper and is not deserving of review of this Court.

C. The Trial Court's Findings of Fact Are Supported by the Evidence on the Record and Are Not Clearly Erroneous.

Petitioner's attack on the trial court's findings of fact supporting its judgment in favor of the University of Pittsburgh in her Title VII claim is totally without merit. The trial court's findings of fact are clearly proper and find compelling evidentiary support in the record.

The Trial court found that:

> Ms. Lewis did have a poor work record, as a buyer from 1967 until 1975 and due to that poor work record was denied the promotion. There is absolutely no direct or circumstantial evidence that she was denied the promotion due to her race (Appendix to Petition at 5a).

Federal Rule of Civil Procedure 52(a) states in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, . . . Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses . . . It will be sufficient if the findings of fact and conclusions of law . . . appear in a memorandum or decision filed by the court.

In the instant case, the trial court made very specific findings of fact and conclusions of law (Record on Appeal at 2a-8a). The court made its findings of fact and conclusions of law on the basic pertinent facts necessary to resolve the contested matters. This is exactly how the trial court should make its findings; there is no necessity for over-elaboration or particularization of facts. *United States v. Forness,* 125 F.2d 928 (2nd Cir. 1942), *cert. denied,* 316 U.S. 694, 62 S. Ct. 1293, 86 L.Ed. 1764 (1942).

The standard of appellate review when the trial court's findings of fact are challenged is that the findings will not be disturbed unless they are clearly erroneous. *United States v. Yellow Cab Co.,* 388 U.S. 338, 341-342, 70 S. Ct. 177, 94 L.Ed. 150, 153 (1949); *United States v. National Ass'n of Real Estate Boards,* 339 U.S. 485, 495-496, 70 S. Ct. 711, 94 L.Ed. 1007 (1950); *United States Steel Corp. v. Fraternal Ass'n. of Steel Haulers,* 601 F.2d 1269 (3rd Cir. 1979).

In the instant case, the crucial issue was whether or not the actions of the decision makers, Fong and Kierzkowski, in not selecting Petitioner for the vacant position in 1976, were racially motivated. The trial court

found that Petitioner had established a *prima facie* case of race discrimination (Appendix to Petition at 6a), that the decision makers had established legitimate nondiscriminatory reasons for their actions (Appendix to Petition at 7a), and that the Petitioner had failed to extablish that the nondiscriminatory reasons were a pretext (Appendix to Petition at 8a).

The reasons set forth by Fong and Kierzkowski for not selecting the Petitioner were that while she held the position of Technical Book Buyer, she had failed to properly return books to publishers for credit, she had failed to properly reorder books, she had failed to properly conduct stock checks, and she had not or would not follow proper Store procedures.

The principal problem with Petitioner's performance as a Buyer arose in 1972 when Kierzkowski assumed the position of Cloth Book Buyer at the Book Center. At this time, it was discovered that Petitioner had failed to properly return and reorder books and to properly conduct stock checks. It was during the same fiscal year, July, 1972 through June, 1973, when the serious nature of the problem was discovered that sales of technical books dropped precipitously by about 36 percent. Petitioner testified that this was not the case, that she had done her returns, reorders and stock checks, and that she did the tasks properly (Record on Appeal at 116a-140a; 152a; 471a-472a; 476a-479a).

Obviously, if things were found to have been the way that Petitioner stated them to be, the articulated reasons would be pretextual since, according to Petitioner, they never occurred, and those testifying to them had necessarily lied. On the other hand, if the reasons set forth by Fong and Kierzkowski were found to be true, then there would be no evidence that the decision was racially motivated.

The trial court, after listening to all the evidence and observing the witnesses, concluded that the decision makers were motivated by the reasons set forth and not by race (Appendix to Petition at 5a). In short, the court resolved the crucial *credibility* issue in favor of the Respondent and against the Petitioner.

Since there is overwhelming evidence in the record which, if believed, supports the Respondent's reasons for denying Petitioner the promotion, there is certainly nothing clearly erroneous about the court's finding on this point. Moreover, credibility determinations are peculiarly within the province of the fact finder. In *United States v. Yellow Cab Co.*, 388 U.S. at 341, 94 L.Ed. at 153, the Court stated:

> Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified.

In the instant case, the trial court believed Respondent's witnesses and ruled accordingly. The jury also heard and saw the witnesses and determined that the decision to select Aiello instead of Petitioner was not racially motivated.

In an effort to avoid the consistent conclusion of both fact finders, Petitioner argues that the trial court and the jury arrived at different findings (Petition at 20). This argument is based on the fact that the jury concluded that Petitioner was more qualified than the person selected for the position (Appendix to Petition at 17a). The trial court found that Petitioner was qualified for the position and did not directly address the relative qualifications of the persons involved. Both fact finders concluded that the decision was not racially motivated.

Simply because the trial court made no finding with regard to whether Petitioner was more or less "qualified" than the person selected does not make its findings inconsistent with the findings of the jury. Both fact finders obviously believed Fong and Kierzkowski when they explained why they chose Aiello to fill the vacancy. If either fact finder had disbelieved the decision makers, the result would have been clear in its verdict. Moreover, as stated by the Court in *Burdine,* 450 U.S. at 259, 67 L.Ed.2d at 219, an employer is not exposed to Title VII liability merely because the fact finder feels that the employer misjudged an applicant's qualifications.

The fact finding of the trial court is completely consistent with the evidence in the record. The preponderance of the evidence supports the factual finding of the trial court with respect to Petitioner's poor work record and to the validity of Respondent's proffered reasons for not selecting Petitioner. Review of the record, as indicated above, only supports the conviction that no mistake was committed by the trial court; hence, its findings of fact were clearly not erroneous.

D. The Trial Court's Jury Instructions Regarding Indirect Proof Were Proper; Moreover, in the Absence of Petitioner's Objection or Request for a Special Charge, They Do Not Constitute Plain Error so as to Warrant Review by This Court.

Petitioner in this Petition argues for the first time that a new trial is required due to what she perceives to be a defective charge to the jury by the trial court regarding inferential or circumstantial proof of intent to discriminate.

A review of the trial court's instructions to the jury reveals that Petitioner is completely misguided in her con-

tention that she was denied the opportunity of proving discriminatory intent by inferential and indirect methods of proof. There is nothing to indicate that the trial court ever prevented Petitioner from presenting proofs which might discredit the Respondent's articulated reason for not promoting her. The trial judge gave explicit instructions that intent could be shown by either direct or indirect proof when he charged:

> Now, there are, generally speaking, two types of evidence from which the jury may properly find the truth as to the facts of this case. One is direct evidence, such as the testimony of any eyewitness. And both attorneys have told you, and I am inclined to agree with them, that there has been little or no direct evidence in this case with respect to the ultimate question involved here.
>
> The other type of evidence is indirect or circumstantial evidence pointing to the existence or nonexistence of certain facts . . .
>
> As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and indirect.

(Record on Appeal at 515-16.) Later the trial court returned to this theme:

> Now, intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by any party whose intent is in issue, and all other facts or circumstances which indicate his or her state of mind.

> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts done knowingly or knowingly omitted, but it is for you to determine what facts have been established by the evidence.

(Record on Appeal at 523-24.)

These instructions, contrary to the claim of Petitioner, afforded her the opportunity to prove inferentially that Respondent's asserted legitimate nondiscriminatory reasons were pretextual. This is all that the Petitioner was entitled to in this respect. Petitioner, relying upon Mr. Justice Blackmun's concurrence in *Aikens*, contends that the trial court erred by failing to charge the jury that Petitioner could prevail by showing that the employer's proffered explanation was unworthy of credence. This would have been merely another way to describe the showing of pretext that a plaintiff must make at the third stage of the *McDonnell Douglas* analysis. Regardless of whether the trial court invoked the express language of *Burdine* or *Aikens* in instructing the jury with respect to the section 1981 and 1983 claims or in disposing of the Title VII claim, it is clear from the verdicts that both judge and jury undertook the pretext analysis required by those cases. Neither the court nor the jury believed that the Respondent's explanation for not selecting Petitioner was a pretext.

Petitioner bases her argument on the jury's finding that Petitioner was more qualified for the position of Assistant Buyer than Aiello. She claims that such a finding, in view of the trial court's instructions with respect to the meaning of "qualifications," signifies that the jury was improperly instructed as to the use of inferential proof. Respondent submits that this reading of the verdict is incorrect. Implicit in the jury's verdict is its belief that

even though the Petitioner was more qualified than Aiello on paper, Aiello excelled when it came down to job performance. There is nothing in the record or the wording of the "qualifications" instruction itself that would detract from the validity of this finding.[5]

Contrary to the Petitioner's argument, the trial court's instruction did not foreclose a finding that Petitioner was more qualified than Aiello even if it believed that Aiello performed better in the duties of the position. Hence, on-the-job performance was but one factor relevant to the evaluation of relative qualifications, along with any education, training and/or experience pertinent to the applicant's ability to perform the job. The "qualifications" instruction went to one of the fundamental elements of Petitioner's prima facie case, and the jury could well have found that Petitioner's superior education, training, and experience were sufficiently relevant to her ability to perform the duties of Assistant Buyer so as to render her more qualified than Aiello despite Petitioner's inferior on-the-job performance. The trial court did not instruct the jury that on-the-job performance was the sole factor or determinative factor to be considered in determining comparative qualifications.

However, after Petitioner made out her prima facie case, the jury was properly free to consider Petitioner's proven inferior job performance in deciding that the

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[5]The trial judge instructed as follows:

> Education, training and experience are factors to be considered in determining the relative qualifications of the plaintiff and Jean Aiello if they are relevant to the person's ability to perform the job. Not all education, training or experience is relevant to the ability to perform every job. However, on-the-job performance is always relevant to a person's ability to perform in a similar or higher job. (Record on Appeal at 525a.)

asserted reasons for not promoting the Petitioner were not pretextual. This is precisely what it did, and in doing so the jury was in no way misled by the trial court's instructions. The issue in such a case is whether or not the defendant made the challenged decision for a legitimate nondiscriminatory reason. The question is not whether that reason is sufficient in the eyes of the fact finder to justify the challenged decision. *Burdine*, 450 U.S. at 259, 67 L.Ed.2d at 219. No error exists in the trial court's instructions concerning indirect or inferential proof, and they are not deserving of review by this Court.

Petitioner, moreover, never requested a special charge on inferential proof of intent, never objected to the instructions in this regard, and never raised this issue to the Court of Appeals. Normally, this neglect to object by the Petitioner would foreclose review of any alleged insufficiency in the jury instructions, unless the insufficiency was found to constitute "plain error" so fundamental and prejudicial that it results in a miscarriage of justice. *Smith v. Coy*, 460 F.2d 1226, 1227 (3rd Cir. 1972); *Paluch v. Erie L. R.R.*, 387 F.2d 996, 999-1000 (3rd Cir. 1968).

Contrary to the contention of the Petitioner, the trial court did not commit plain error in instructing the jury. Thus, the trial court not only instructed the jury as to the permissibility of proving facts through indirect or circumstantial evidence, but it further proceeded to underscore the significance of that mode of proof by reiterating the summation of each parties' counsel with regard to the dearth of direct evidence of discriminatory intent. Nothing in the trial court's instructions prevented the jury from finding for the Petitioner if it believed that there was sufficient indirect evidence of discriminatory intent to do so. Nor did the trial court inadequately instruct the jury as to how to evaluate inferential proof of intent.

In *Anderson v. United States*, 417 U.S. 211, 94 S. Ct. 2253, 41 L.Ed.2d 20 (1974), this Court held that even assuming that jury instructions were deficient, where no objection was made to them at trial and the case ultimately hinged on the jury's resolution of a credibility conflict, there was no error sufficient for remand of the case. *Id.* at 228, 41 L.Ed.2d at 33. Here, the jury's verdict hinged on whether it believed Petitioner or whether it believed Respondent's witnesses. It is clear that it counted the testimony of the latter more persuasive, and the Petitioner should not be allowed now to fabricate a challenge to the trial court's instructions as a pretext for review by this Court of the jury's credibility resolutions. As discussed above, the jury's verdict is consistent with the indirect evidence at issue here. As in *Anderson*, therefore, there is no plain error sufficient to warrant review by this Court.

E. The Trial Court Applied the Proper Legal Standard of Causation to All of Petitioner's Claims.

The trial of this case involved one basic issue. Was Petitioner denied the position she sought in October, 1976, because of her race? Although Petitioner filed suit claiming violations of Title VII as well as Sections 1981 and 1983, it is clear that she had the burden of proving intentional and purposeful discrimination because of her race on the part of the persons making the challenged decision. *Burdine*, 450 U.S. at 256, 67 L.Ed.2d at 217 (Title VII disparate treatment cases require showing of intentional discrimination); *Croker v. Boeing*, 662 F.2d 975, 988-989 (3rd Cir. 1981) (Section 1981 requires purposeful discrimination); *Jackson v. City of Killeen*, 654 F.2d 1181, 1183 (5th Cir. 1981) (Title VII and Section 1981 require proof of intentional discrimination); *McWilliams v. Escambia County School Board*, 658 F.2d 326, 330-332 (5th Cir. 1981) (dis-

parate treatment cases under Title VII, Section 1981 and Section 1983 all require proof of purposeful discrimination; *McDonnell Douglas* scheme applied to each claim). Petitioner's allegations that her civil rights had been violated under all of her claims were premised on the alleged racially motivated failure to promote her in 1976. There is no difference in the theories of her claims nor in the evidence that was presented as to each of the claims.

In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S. Ct. 2574, 49 L.Ed.2d 493 (1976), this Court, in discussing the order of proof in claims of racial discrimination involving disparate treatment, stated:

> The use of the term "pretext" in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged pretextual deficiencies; as the closing sentence to the quoted passage makes clear no more is required to be shown that *that race was a "but-for" cause. See also Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L.Ed.2d 280, 300-301 (1975).

427 U.S. at 282, fn.10, 49 L.Ed.2d at 502, fn.10 (emphasis added).

Similarly, in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the court dealt with the question of a similar jury instruction in a case involving allegations of age discrimination. Citing *McDonald v. Santa Fe Trail Transportation Co.*, the court stated:

> We do not quarrel with the court's statement that age did not have to be the sole factor motivating defendants to act; we do think, however, that the court should have instructed the jury that *for plaintiff to*

> *prevail he had to prove by a preponderance of the evidence that his age was the "determining factor" in his discharge in the sense that "but for" his employer's motive to discriminate against him because of age, he would not have been discharged.*

600 F.2d at 1019 (emphasis added).

In *Jackson v. City of Killeen*, the court, in a case brought under Title VII and Section 1981, held, again citing *McDonald v. Santa Fe Trail Transportation Co.*, that the:

> Plaintiff failed to show that the defendant's reasons for her discharge were pretextual, *i.e., that her race was a "but for" cause or determining factor for her discharge.*

Id. at 1186 (emphasis added).

In *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9 (2nd Cir. 1981), the court, as in *Loeb*, addressing a similar jury instruction in a case alleging age discrimination, stated:

> . . . a plaintiff must prove that age was a "determining factor in his discharge in the sense that 'but for' his employer's motive to discriminate against him because of his age, he would not have been discharged."

Id. at 11-12 (quoting *Loeb*, 600 F.2d at 1019).

The First, Second, Third, and Fifth Circuits are in agreement as to the standard to be applied in demonstrating pretext. Petitioner vainly attempts to argue that there is a conflict among the circuits by citing the "significant factor" test set forth in *Whiting v. Jackson State University*, 616 F.2d 116, 121 (5th Cir. 1980), and contending that that test conflicts with the "but for" test (Petition at 22-23).

The Court of Appeals, in disposing of this argument, stated:

> We do not read *Whiting* as departing from the "but for" causation requirement. By definition, a "significant" factor is one which makes a difference in the result. Conversely, if an action would have been taken regardless of race, any discriminatory factor could hardly be called "significant." We can discern little difference in the result between a "significant factor" test and the "but for" test.

Lewis, 725 F.2d at 916 (Appendix to Petition at 24a). Respondent submits that the Court of Appeals correctly understood the "significant factor" test of *Whiting* to be the functional equivalent of the "but for" test here.

Regardless of any semantic difference from the "but for" standard, the test set forth in *Whiting*, if properly applied, should produce the same result as the "but for" test. Hence, there is no conflict among the circuits in this regard. Moreover, the Fifth Circuit's express adoption of the "but for" standard in *Jackson v. City of Killeen*, decided after *Whiting*, renders moot the Petitioner's claim of conflict among the circuits.

Review of the trial court's instructions to the jury (Record on Appeal at 505a-537a), and the trial court's findings of fact and conclusions of law (Appendix to Petition at 2a-8a), establishes that the court applied the proper standard in this case. Contrary to Petitioner's assertion, the court clearly did not require that she prove that race was the sole reason for her being denied the position she sought (Record on Appeal at 523a). The court simply required her to prove that she was rejected because of her race, which, after all, has been her claim since 1976.

The trial court found that, "There is absolutely no direct or circumstantial evidence that [Petitioner] was denied the promotion due to her race" (Appendix to Petition at 5a). The court went on to find that the Respondent had "proven by a preponderance of the evidence that the reason [Petitioner] was not promoted was because she had a poor work record when she was the Technical Book Buyer from 1967 to 1975" (Appendix to Petition at 7a). Finally, the court held that the Petitioner failed to prove that the legitimate nondiscriminatory reasons set forth for denying her the promotion were pretextual (Appendix to Petition at 8a). The jury also concluded that Petitioner's race was not the reason for her failure to receive the promotion. In light of Petitioner's education and experience, the only reason that the jury could have had for concluding that race was not the reason for her being denied the promotion was that it believed that Fong and Kierzkowski relied on their stated reasons for not selecting her. If it had disbelieved their reliance on the articulated reasons, it would necessarily have found for Petitioner because race would have been the only reason left for denying her the promotion.

In the final analysis, Petitioner seeks to overturn the credibility and factual determinations of two fact finders who reached the same conclusion after hearing the same evidence. Those findings of fact and credibility determinations are entitled to great weight and should not be overturned absent compelling evidence in the record that they are clearly erroneous. No such evidence exists, despite the Petitioner's exhaustive efforts to conjure it. This Court should deny review of this issue.

V. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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